IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 2033 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ROLCON ENGINEERING CO LTD. - Petitioner(s)
Versus
STATE OF GUJARAT & 5 - Respondent(s)

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Appearance :
MR NAYAN A SHETH with MR TANVISH U. BHATT for Petitioner(s)
MR HASIT DAVE, ASST. GOVERNMENT PLEADER for Respondent(s) : 1 - 6.
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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE
and
HONOURABLE MR.JUSTICE K.A.PUJ

Date : 02/03/2006

ORAL JUDGMENT (Per : HONOURABLE MR.JUSTICE ANIL R. DAVE)

1. The petitioner has been aggrieved by orders dated 30.1.2004 and 31.1.2004 passed by respondent

No. 5, Sales Tax Officer (1), Class 1, Anand, whereby benefits given to it under “The Sales Tax Incentive Scheme for Wind Power Generation, 1993” have been withdrawn and by an order dated 12.2.2004, whereby the petitioner has been called upon to pay Rs. 1,05,82,588/- because it did not fulfill the conditions on which the benefits were given to it in respect of payment of sales tax.

2. The circumstances giving rise to the petition, in a nutshell, are as under:

3. In view of perennial shortage of electricity, the State of Gujarat had framed a scheme named “The Sales Tax Incentive Scheme for Wind Power Generation, 1993” (hereinafter referred to as '**the Scheme**') to the effect that if any industrial undertaking erects a windmill and generates electricity, certain tax incentives in the nature of exemption or deferment of payment of sales tax would be given to such an industrial undertaking. The said scheme had been framed in pursuance of Government Resolution dated 27.1.1993. The scheme was modified from time to time by issuance of subsequent resolutions, but the basic features of the scheme had been retained.

4. Condition (f) was added to clause 7 of the

scheme by virtue of Government Resolution dated 13.6.1994, whereby the scheme was modified to the effect that the industrial undertaking availing benefit under the scheme had to run the wind farm satisfactorily at least for 6 years from the date of commissioning the same, and if the wind farm is not run satisfactorily for 6 years from the date of its commissioning, the sales tax benefits availed by the industrial undertaking would be recovered from it by the State.

5. In pursuance of the aforesaid scheme announced by the State, the petitioner, an industrial undertaking, had set up a wind farm for generation of electricity and started its operation on 31.1.1995. The fact with regard to setting up of the wind farm had been conveyed to the government authorities and the petitioner undertaking was given composite benefit in respect of payment of sales tax by an order dated 5.11.1996 on conditions incorporated therein.

6. After setting up the wind farm, the petitioner was regularly supplying electricity to Gujarat Energy Development Agency (GEDA) as per the scheme and was also availing composite benefit in respect of payment of sales tax as per Eligibility Certificate dated 5.11.1996 issued by the Assistant Commissioner of Sales Tax, Admn. Circle 12, Nadiad.

7. The petitioner had availed composite benefit under the scheme, whereby payment of sales tax,

collected by the petitioner on sale of goods manufactured by it, to the government was deferred and the petitioner had to make payment to the government in six equal annual instalments.

8. Before all the six yearly installments of tax could be paid by the petitioner, a devastating cyclone hit the coastal areas of Saurashtra on 9.06.1998, which, among other things, destroyed the wind farm set up by the petitioner. Two windmills erected by the petitioner had been completely destroyed and even the transmission lines, whereby electricity generated by the petitioner was supplied to GEDA, had also been adversely affected in such a manner that even if the windmills had not been destroyed, the electricity generated at the wind farm of the petitioner could not have been transmitted to GEDA.

9. In the aforesaid circumstances, the petitioner had informed GEDA on 9.7.1998 about the aforesaid destruction and sought necessary instructions from it. The Commissioner of Electricity, upon knowing the fact with regard to the damage caused to the windmills erected by the petitioner, had got the damage assessed and had also submitted his report to concerned authorities.

10. The petitioner made all possible efforts to see that the destroyed windmills, are properly repaired and restarted so that it can start generating

electricity and supply the same to GEDA.

11. The Commissioner of Electricity, respondent No. 3 herein, issued a notice dated 17.6.2000 calling upon the petitioner to show-cause as to why the Eligibility Certificate dated 5.11.1996 issued to the petitioner be not cancelled as the petitioner had committed breach of clause 7(f) of the scheme by not keeping the wind farm/windmills in operation for a continuous period of 6 years after commissioning the same.

12. Upon receipt of the said notice, under letter dated 22.6.2000, the petitioner gave reply to respondent No. 3 stating that it had erected two windmills in its wind farm in pursuance of the scheme and out of six, the petitioner had already paid four instalments of tax which had become due and payable before 22.6.2000. The petitioner had mainly submitted in the said reply that the benefit given to it under the scheme should not be withdrawn as the windmills erected by it had been completely destroyed due to the cyclone, which was a natural calamity, for which the petitioner was in no way responsible. The petitioner had also made a grievance that looking to the extent of damage caused to the petitioner due to the natural calamity, the government should have offered some sort of help or relief to the petitioner, rather than calling upon it to show cause as to why the benefit given to it should not be withdrawn because, normaly, the Central and State

governments give relief to those who are adversely affected due to natural calamities, but, instead of giving any help, the petitioner was put to more difficulties by the impugned action.

Till today, no final decision has been taken in pursuance of the said show cause notice given by respondent no. 3.

13. Thereafter, by a notice dated 18.12.2003, respondent No. 5, Sales-tax Officer (1), Unit 2, Anand, called upon the petitioner to furnish certain information and finally, by virtue of notice dated 30.1.2004, respondent No. 5 called upon the petitioner to pay (including penalty and interest) a sum of Rs. 1,05,82,588/-, as a result of withdrawal of the benefit which already had been granted to the petitioner.

14. Being aggrieved by the said orders passed by respondent No. 5, the petitioner has preferred an appeal before respondent No. 6, on 9.2.2004. Though an appeal had been filed against the order dated 30.1.2004 passed by respondent No. 5, respondent No. 5 passed an order on 12.2.2004, whereby bank account of the petitioner had been attached.

15. Being aggrieved by the orders passed by respondent No. 5, which are at Annexures N, O and R to the petition, whereby the petitioner has been asked to pay Rs. 1,05,82,588/-, and whereby its bank account has been attached, the petitioner has filed

this petition.

16. During the pendency of the petition, ad-interim relief had been granted to the petitioner, whereby the attachment of its bank account has been released.

17. In pursuance of notice issued by this court, an affidavit-in-reply has been filed by respondent No. 5 on behalf of the government authorities. The sum and substance of the reply is that the petitioner had committed breach of condition contained in Clause 7(f) of the scheme and therefore the impugned actions of the respondent authorities are just and proper. Clause 7(f) of the scheme, which was added in the scheme under Government Resolution dated 13.06.1994 reads as under;

> "(f) All wind farms which avail concessions under this Govt. Resolution should keep the wind farms running satisfactorily at least for six years from the date of commissioning of the same, failing which the sales tax benefits availed by the industrial undertakings will be recovered."

18. According to the respondent authorities, the farm which had been commissioned by the petitioner on 31.1.1995, for availing the sales tax benefit, ought to have been kept in running condition for a period of 6 years from the date of its commencement i.e. upto 31.1.2001. As the wind farm did not run satisfactorily till 31.1.2001, the petitioner had committed breach of the aforesaid condition and,

therefore, it was not entitled to any benefit under Eligibility Certificate dated 5.11.1996, which is at Annexure 'E' to the petition.

19. We have heard learned advocate Shri Nayan Sheth appearing with learned advocate Shri Tanvish Bhatt for the petitioner and learned AGP Shri Hasit Dave for the respondent authorities.

20. It has been mainly submitted on behalf of the petitioner that it is an admitted fact that the petitioner could not continue to generate electricity up to 31.1.2001 on account of the destruction caused by the cyclone on 9.6.1998. He has further submitted that till the windmills had been destroyed due to the cyclone, electricity generated by the windmills was being regularly supplied to GEDA and no default was ever committed by the petitioner in respect of supply of electricity generated by it with the help of its two windmills.

21. According to him, the default occurred only on account of the cyclone because the windmills had been completely destroyed due to the cyclone. There was no intention on the part of the petitioner to discontinue generation of electricity but only on account of a natural calamity – **vis majore** – the generation and supply of electricity had been discontinued. It is his case that on account of the default, which had resulted on account of an Act of God, the petitioner should not be penalised

especially in view of the fact that the petitioner was paying the instalments of sales tax as per the schedule and even two remaining instalments, which had to be paid by the petitioner, had already been paid. Thus no amount of tax had remained unpaid by the petitioner.

22. It has been also submitted that Clause 7(f), which had been incorporated in the scheme by virtue of Government Resolution dated 13.6.1994, should be read in its true spirit and not in a manner which would be detrimental to the petitioner.

23. It has been further submitted that the petitioner had insured only one windmill and from the amount of insurance claim received by it, one of the windmills had already been restarted and the said windmill is operating and the electricity generated by it is being supplied to GEDA regularly.

24. It has been thereafter submitted that the scheme had been framed by the State of Gujarat with a laudable object of encouraging generation of electricity in the State and to help those who were venturing into the business of generation of electricity, which helps the nation, as electricity is always in short supply. It has been submitted that the said policy can be compared with a beneficial legislation. According to him, whenever the State formulates a policy to give some benefit to anyone, the policy should be interpreted in a way

so as to give some benefit to the beneficiary of the scheme. In the instant case, the petitioner is not allowed to avail the benefit because its windmills got destroyed (only on account of an "Act of God") and therefore the petitioner could not continue to generate electricity continuously for a period of six years after commissioning the windmills. In the circumstances, the petitioner should not be deprived of the benefit already given to it.

25. On the other hand, learned AGP Shri Hasit Dave has submitted that one has to strictly go by the conditions incorporated in the policy to avail the benefit. He has submitted that as per clause 7(f) of the scheme, the petitioner ought to have continuously generated electricity for a period of 6 years, that is, up to 31.1.2001, and as the petitioner did not comply with the said condition, the benefit cannot be given to it and, therefore, the impugned orders are just, legal and proper.

26. It has been further submitted by him that the petitioner has already filed an appeal and after having resorted to an equally efficacious alternative statutory remedy available under the provisions of the Gujarat Sales Tax Act, 1969 (hereinafter referred to as 'the Act'), the petitioner ought not to have rushed to this court with a petition and, therefore, the petition deserves to be dismissed.

27. We have heard the learned advocates at length

and have also gone through the record pertaining to the case, including the resolutions passed by the government from time to time in relation to the scheme and about its policy with regard to giving benefits to those who generate electricity by setting up wind farms.

28. It is not in dispute that the petitioner had initially fulfilled all the conditions, which were required to be fulfilled, as per the Eligibility Certificate dated 5.11.1996 issued to it whereby composite benefit was granted to the petitioner in respect of payment of sales-tax. It is also not in dispute that before the fateful day, when the cyclone had hit the coastal area of Saurashtra, the petitioner was continuously generating electricity with help of the windmills on the wind farm and was supplying electricity to GEDA as per the scheme. Thus, it is an admitted fact that till the cyclone had hit the coastal area of Saurashtra on 9.6.98 and caused massive destruction, as per conditions incorporated in the certificate issued to the petitioner, and as per scheme framed by the government, the petitioner was generating electricity and was supplying the same to GEDA uninterruptedly.

29. Now, this Court has to consider provisions of clause 7(f) and has to decide whether the petitioner can be deprived of the benefit already availed by it under the scheme and the eligibility certificate issued to it in the circumstances mentioned

hereinabove.

30. With the increase in industrial and other activities as well as domestic consumption, electric power has become an essential and much sought after commodity. The existing power plants in the State, both thermal and hydro-electric, have not been able to meet the ever increasing demand for power. Due to this reason, the state of Gujarat decided to tap other sources of energy and hence formulated the scheme, whereby small undertakings, though they are not directly connected with generation of electricity, are encouraged to generate electricity. The scheme framed by the government not only helps the nation to augment power generation and supply, but it also gives certain benefits to the industrial undertakings generating electricity in the nature of sales tax exemption or deferment or composite benefit under the Act. Looking to the said fact, we can definitely treat the scheme framed by the government under Government Resolution dated 27.1.1993 at par with a beneficial legislation.

31. It is not in dispute that the petitioner had no intention to discontinue generation of electricity and the disruption was caused due to the damage caused to the windmills and transmission lines of GEDA as a result of a devastating cyclone that hit the coastal area of Saurashtra. It cannot be disputed that the said cyclone was an Act of God, a vis majore. The intention behind incorporating

clause 7(f) in the scheme was to see that the taxpayer industrial undertaking does not discontinue generation of electricity after availing benefit under the scheme. We are conscious of the fact that very often unscrupulous persons and corporate bodies take undue advantage of a scheme or policy framed for a noble cause. In the beginning they fulfill the conditions and thereafter they commit breach of the conditions and as a result of which the laudable purpose with which the scheme is framed, is frustrated. If such a dishonest taxpayer commits breach of any of the conditions incorporated in the scheme, the State should not give any tax benefit or tax holiday to such an unscrupulous taxpayer. Only with an intention to see that after erection of windmills, an industrial undertaking availing benefit does not stop generation of electricity, the aforestated clause 7(f) had been incorporated in the scheme subsequently. So, the intention was to see that the industrial undertaking availing the benefit does not commit default by stopping generation of electricity before completion of 6 years. In other words, it was obligatory to generate electricity for a continuous period of 6 years so as to avail the benefit under the scheme.

32. Looking to the language employed in clause 7(f) of the scheme, it is clear that so as to retain the benefit already granted, an industrial undertaking “should keep the wind farm running satisfactorily at least for 6 years from the date of commissioning

the same". The language used in the said clause cannot be interpreted to read that even if due to factors beyond control of the industrial undertaking, if the wind farm cannot be kept in a running condition, there would be breach of the said condition. The condition incorporated in the said clause deals with a voluntary action on the part of the industrial undertaking. The said clause can be invoked for withdrawal of the benefits if it is found that either deliberately or due to gross negligence on the part of the industrial undertaking, the wind farm was not kept in running condition. So, in our opinion, if the act of discontinuing generation of electricity is deliberate or voluntary, then only the concerned industrial undertaking should be deprived of the benefit availed under the scheme.

33. In the instant case, it is not even the case of the respondent government authorities that the petitioner had done something deliberately or on account of its carelessness, generation of electricity could not go on uninterruptedly or the wind farm did not run satisfactorily for a period of 6 years from the date on which its operation had commenced. It cannot be disputed that it was only on account of an act of God, "vis majore", that the petitioner industrial undertaking could not keep the wind farm running after 9.6.1998.

34. If one looks at the principles on which a beneficial legislation or a benevolent policy of the

State is to be interpreted, it cannot be disputed that when the State is inclined to give some benefit to a taxpayer, the terms or provisions of the policy should be interpreted in a liberal manner and with an intention to see that the purpose for which the policy is framed is fulfilled and the beneficiary is helped. The interpretation must not be such which would frustrate the objective of the policy. The aforestated principle is very well established and has been also accepted by our Apex Court.

35. It is a settled legal position that a person cannot be constrained to do something which is impossible. There is a well known legal maxim “Lex non cogit ad impossibilia”, which means that law cannot compel a man to do what he cannot possibly do.

36. If there is an impossibility on the part of a person to perform an obligation, law would not expect the person to do that impossible thing. The said maxim, which has been accepted by our judicial system, has been very well explained in 'Broom's Legal Maxims' (10th Edition) as under:

> “.....It is then, a general rule which admits of ample practical illustration, that impotentia excusat legem; where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and has no remedy over, there the law will in general excuse him (t): and though impossibility of performance is in general no excuse for not performing an

> obligation which a party has expressly undertaken by contract, yet when the obligation is one implied by law, impossibility of performance is a good excuse.....”

37. The aforesaid maxim has also been explained in 'Craies on Statute Law' (7th Edition):

> “Under certain circumstances compliance with the provisions of statutes which prescribe how something is to be done will be excused. Thus, in accordance with the maxim of law, Lex non cogit ad impossiblia, if it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like the act of God or the King's enemies, these circumstances will be taken as a valid excuse”

38. The Hon'ble Supreme Court has approved the aforestated meaning of maxim “lex non cogit ad impossibilia” in the case of I.F.C.I. Ltd Vs. Cannanore Spinning and Weaving Mills Ltd, AIR 2002 SC 1841.

39. So far as the case on hand is concerned, impossibility was on account of vis-majore, an Act of God. It is not even the case of the respondent authorities that the condition incorporated in Clause 7(f) of the scheme was violated by the petitioner

deliberately. It cannot be disputed that the cyclone was an Act of God, which completely destroyed two wind-mills set up by the petitioner, which made it impossible for it to fulfill one of the conditions incorporated in the scheme. As stated hereinabove, till the cyclone had hit the coastal area of Saurashtra, the petitioner had continuously operated both the wind-mills and had supplied electricity scrupulously to GEDA. Not a single default had been committed by the petitioner and only on account of vis-majore, it became impossible for the petitioner to generate and supply electricity as per the aforestated condition. It is also pertinent to note that one of the wind-mills, which had been duly insured, had been commissioned immediately upon getting insurance claim and this fact reveals that the petitioner had no dishonest intention to commit breach of any of the conditions on which the benefit had been availed by it under the scheme. We, therefore, hold that the petitioner cannot be deprived of the benefit, which had been given to it under the scheme only because it could not fulfill the condition due to an Act of God or because of impossibility on its part to perform the same.

40. It is pertinent to note that the Eligibility Certificate, which had been granted to the petitioner by the Commissioner of Electricity, has yet not been cancelled and it is a settled legal position that till the Eligibility Certificate is cancelled, the benefit of tax relief or any other benefit given

under the said certificate cannot be taken away by the government authorities. In the instant case also, it is not in dispute that the Eligibility Certificate has not been cancelled yet. In our opinion, there is no reason for cancelling the same as the petitioner has not committed any default deliberately, which would result into cancellation of the Eligibility Certificate. In view of the aforestated reason also, in our opinion, the petitioner could not have been denied the benefit, which it had availed under the Eligibility Certificate.

41. We also would like to add that whenever there is any beneficial legislation or any scheme giving certain benefit to anyone, the scheme should be interpreted so as to make its objective more effective and not in a manner which would frustrate the objective. In the instant case, the State wanted generation of additional electricity and under the scheme, the said task had been partly taken over by the petitioner and in fact the petitioner generated electricity as long as it was in a position to do so. The scheme, being framed not only for the benefit of the State but also for the entities like the petitioner, it ought to have been interpreted in a liberal manner.

42. It is also pertinent to note that the benefit, which had already been availed by the petitioner, is sought to be taken back after several years. The

devastating cyclone had destroyed the wind-mills on 9.06.1998 whereas the respondent authorities started initiating action against the petitioner in December 2003. In our opinion, the respondent authorities should not have withdrawn the benefit, which had already been enjoyed by the petitioner long before the date on which notices were issued to it. In the case of **Birla Jute and Industries Ltd. v. State of M.P. And another**, 119 STC 14, it has been observed by the Hon'ble Supreme Court that the benefits already enjoyed under an incentive scheme should not be withdrawn long after its enjoyment by the beneficiary.

43. Looking to the aforesaid factual and legal position, in our opinion, it would be most unjust and inequitable to deprive the petitioner industrial undertaking of the benefit which has already been enjoyed by it. It is pertinent to note that the petitioner has acted in a bona fide manner. No breach has been committed by it. After availing the benefit, the petitioner had paid all four instalments of sales tax, which had become due and payable in respect of payment of sales tax. Remaining two instalments have also been paid by the petitioner as submitted by the learned advocate for the petitioner. One cannot ignore the devastating effect of the cyclone which had taken the entire coastal area of Saurashtra in its sweep. When the nature had become so harsh to the lives of people and their properties in the entire coastal area of Saurashtra, in our opinion, it would not be proper

for a welfare State to become further harsh and withdraw the benefits already granted to the persons who had acted in good faith for availing benefits under a particular policy of the State. By withdrawing the benefits, which had already been given to them under the policy of the State, the State would be acting unfairly and that would not befit a welfare State, which is expected to act in a fair and equitable manner.

44. We, therefore, hold that clause 7(f) of Government Resolution dated 13.6.1994 would apply only if the beneficiary unit does something, whereby it deliberately stops generating electricity during the period of 6 years commencing from the date on which it starts generation and supply of electricity under the scheme. If the continuity is broken on account of vis majore or a factor which is absolutely beyond the control of the concerned industrial undertaking, in our view, the State of Gujarat should not deprive the beneficiary of the benefits already granted to it. We firmly believe that it becomes duty of the State to help such units in mitigating the sufferings instead of pushing them into more pitiable condition.

45. It is true that the petitioner has already availed an equally efficacious alternative remedy available to it under the provisions of the Act by preferring an appeal before respondent No. 6. The said appeal is still pending and, therefore, the

learned AGP has submitted that the petition should not be entertained.

46. We do not agree with the above submission for the reason that by an order dated 12.2.2004, the bank account of the petitioner industrial undertaking had been attached and the petitioner was put to more difficulties because it was unable to operate its account. It is possible that the petitioner could not have made grievance with regard to such a drastic action before the statutory authorities in a most effective manner. In the circumstances, the petitioner must have been constrained to approach this court. It is also pertinent to note that a representation had been made to the State of Gujarat on the subject-matter of this petition and a decision on the representation was also kept pending for a considerably long period. The said representation has possibly not been decided in favour of the petitioner and similarly situated persons. When there was a matter pertaining to a policy decision, in our opinion, possibly, respondent No. 6 could not have done justice to the petitioner. Moreover, it is a settled legal position that alternative remedy is not a total bar to a petition under Art. 226 of the Constitution of India. Looking to the facts of the case, we feel that the extraordinary jurisdiction of this court under Article 226 of the Constitution should be exercised. We, therefore, hold that the authorities should not have treated discontinuation of generation of

electricity and its supply by the petitioner as breach of clause 7(f) of the scheme in view of the fact that the discontinuation had been caused due to a natural calamity. As we are convinced that there was no deliberate default on the part of the petitioner unit, we quash and set aside the impugned orders passed by respondent No. 5.

47. The petition stands disposed of as allowed. The impugned orders passed by respondent No. 5 dated 30th and 31st January, 2004 and consequential order dated 12th February, 2004 are quashed and set aside. Rule is made absolute with no order as to costs.

(ANIL R. DAVE, J.)

(K.A. PUJ, J.)

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